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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-248

UNITED STATES GYPSUM COMPANY,
Petitioner and Defendant-Appellee-Cross-Appellant Below,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Plaintiff-Appellant-Cross-Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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No.

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UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Plaintiff-Appellant-Cross-Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, United States Gypsum Company, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Fifth Circuit entered in the above entitled cause on April 11, 1974.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Alabama is reported at 339 F. Supp. 302. It is printed in separate Appendix C hereto, pp. A40-A41. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 492 F. 2d 713. It is printed in separate

Appendix A hereto, pp. A1-A37. The per curiam statement denying the petition for rehearing has not as yet been officially reported. It is printed in separate Appendix B hereto, pp. A38-A39.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 11, 1974. A timely petition for rehearing was denied on July 31, 1974. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Pursuant to a judgment in a § 301(a) action (29 U. S. C. § 185(a)) an arbitration was held between a union and a new employer under the outstanding collective bargaining agreement negotiated with the predecessor employer which the new employer neither agreed to nor assumed. Underlying each of the questions here presented is the decision of the Court of Appeals that the arbitrator could as a matter of law hold that the new employer was bound by certain provisions of said agreement. Those questions are:

1. Whether in such an arbitration a new employer, who purchased the assets of a plant of the predecessor employer with specified exceptions including the outstanding collective bargaining agreement negotiated with the predecessor employer and shortly thereafter employed all but three of the predecessor's employees in the same bargaining unit, is bound to honor the check off and reopener provisions of said agreement?

2. Whether in such an arbitration the arbitrator's award that the new employer pay to the union, without right of recoupment from wages of employees, the amount of union dues that might have been checked off to the date of the union's decertification if the new employer had honored the dues check off provision of said collective bargaining agreement and also the

check off authorizations previously given to the predecessor employer by the employees who subsequently became employees of the new employer, is valid?

3. Whether in such an arbitration the arbitrator's award of a wage increase to all employees of the new employer under a provision in the collective bargaining agreement providing that the contract might be reopened mid-term for negotiation of a wage increase by service of a specified notice, is valid under the following circumstances: (a) the union requested that the collective bargaining agreement be extended by the arbitrator for an additional period commensurate with that during which it was rendered ineffective because of the refusal of the new employer to honor said contract; (b) no evidence of the service of a notice to reopen the contract was presented to the arbitrator; (c) neither party to the arbitration requested an award of a wage increase or presented any evidence or argument to the arbitrator relative to a wage increase that might have been negotiated; and (d) the arbitrator's award was in an amount found by the arbitrator on his own research without affording the parties to the arbitration a hearing relative to such wage increase?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

This case involves Amendment V to the Constitution of the United States and the following sections of the Labor Management Relations Act, 1947, as amended: §§ 8(a)(2), (5) and (d); 9(a) and (c)(1)(B); 10; 203(a) and (d); 301 and 302(a), (b)(1), (c) and (d). (29 U. S. C. §§ 158(a)(2), (5) and (d); 159(a) and (c)(1)(B); 160, 173(a) and (d); 185 and 186(a), (b)(1), (c) and (d)). The pertinent texts thereof are printed in separate Appendix D hereto, pp. A52-A59.

STATEMENT OF FACTS.

The following facts are uncontroverted except in one instance hereinafter noted.

On April 1, 1965, Petitioner (Gypsum) purchased the assets of a lime plant of United Cement Company, Inc. (United) with specified exceptions including the outstanding collective bargaining agreement dated March 30, 1964, between the United Steelworkers of America, AFL-CIO (Steelworkers) and United which by its terms expired March 30, 1967. The agreement contained, *inter alia*, a check off provision under which United agreed "to check off union dues . . . from the pay of employee who gives written authorization to the Company for such deduction", a grievance procedure ending with an arbitration clause which provided that the "arbitrator shall only have jurisdiction . . . to interpret, apply or determine compliance with the provisions of this agreement" but shall "not have jurisdiction . . . to add to, detract from, or alter in any way the provisions of this contract" and a provision that "the contract may be reopened only for negotiation of a wage increase . . ." for the third year of the contract by notice "in the same manner as that required by law to negotiate for a new contract". Neither the collective bargaining agreement nor the check off authorizations given to United thereunder contained a successorship clause.

United terminated all employees of the plant March 28, 1965. Gypsum started operation of the plant April 5, 1965 at which time or shortly thereafter Gypsum employed all except three former employees of United. Despite the fact that the unexpired collective bargaining agreement had been entered into between the Steelworkers (the International Union) and United to which the Steelworkers' Local 5674 was not a party, an amendment to that agreement had subsequently been entered into in 1964 between that local union and United. The Steelworkers was not a party to this later agreement and Gypsum had

a bona fide doubt whether the local, the Steelworkers, both the local and the Steelworkers, or any union then represented a majority of the employees:[1]

On May 3, 1965, the Steelworkers' business agent requested remittance of April union dues. The plant manager replied, *inter alia*, that United's contract did not bind Gypsum, that Gypsum had no check off authorizations and needed evidence of the Steelworkers' representative status. Without further contact with Gypsum the Steelworkers presented the grievance dated May 17, 1965 here involved. This grievance complained of occurrences subsequent to Gypsum's operation of the plant. It alleged that Gypsum had refused to recognize or deal with the Steelworkers or to comply with the contract[2] and specific alleged violations of the contract not here in issue. The grievance was presented prior to the time when the contract could be reopened and no grievance alleging any violation of the reopening provision of the contract was ever filed. Gypsum answered the grievance by letter dated May 28, 1965 stating, *inter alia*, that the contract was with United that "it has not made dues deductions because it has no authorizations from employees to do so", and that current information was that no union had a majority representation of employees. Without further contact with Gypsum the Steelworkers filed a § 301(a) action (29 U. S. C. § 185 (a)) to compel Gypsum to recognize the contract and arbitrate thereunder.

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1. The Steelworkers contest the statement that Gypsum's doubt was *bona fide*.

2. "1. The Company refuses to recognize and comply with the contract executed March 30, 1964 . . .

"3. The Company has failed and refused to deduct union dues in accordance with Article VI of the contract . . .

"5. The Company has announced that it is not bound by said contract.

"6. The Company has refused to recognize or deal with the duly authorized officers and representatives of the Union."

Gypsum then instituted representation proceedings before the NLRB to determine the unions' representative status (157 NLRB 652 and 161 NLRB 601). The Steelworkers filed, but later withdrew, an unfair labor practice charge that Gypsum had violated § 8(a)(5) of the LMRA (29 U. S. C. § 158(a)(5)). During pendency of these proceedings the District Court entered judgment that the Steelworkers and Gypsum arbitrate the grievance under the contract and Gypsum appealed from this judgment. While the appeal was pending the Board decertified the Steelworkers. The Court of Appeals thereafter affirmed the judgment of the District Court. *United States Gypsum Company* v. *United Steelworkers of America, AFL-CIO*, 384 F. 2d 38 Cert. Den. 389 U. S. 1042 (1972).

In the ensuing arbitration no evidence of the service of a notice to reopen the contract was presented to the arbitrator. Neither party presented evidence or argument to the arbitrator relative to a wage increase that might have been negotiated. In the post hearing brief the Steelworkers requested that the arbitrator "extend the contract for an additional period commensurate with that during which it was rendered ineffective" because of Gypsums' refusal to honor the contract.

The arbitrator held that Gypsum was bound by the collective bargaining agreement and had violated the reopening provision thereof. He awarded a retroactive wage increase to all employees regardless of the period during which they were employed by Gypsum in an amount that he found from the arbitrator's own reference to a BNA Survey of wage increases in 1967 might have been negotiated. No opportunty was afforded for a hearing relative to such increase. The statement of facts in his report quoted Gypsum's letter of May 28, 1965 (*supra*, p. 5) but the arbitrator held that the issues relative to check off authorizations to Gypsum were an "afterthought" and came "too late", "which the Union might readily have overcome had the Company brought them to the Union's attention at the time of the takeover or filing of the grievance" and awarded payment to the

Steelworkers, without right of recoupment from Gypsum's employees, in an amount equivalent to the union dues that might have been checked off to the date of the Steelworkers' decertification.

The Steelworkers instituted a § 301(a) action (29 U. S. C. § 185(a) to enforce the award. The District Court found that the collective bargaining agreement was binding upon Gypsum, but that the wage award had the effect of making a new contract and violated the agreement and national labor policies as explained in *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970). It held that Gypsum's objections to the arbitrator's check off award went to the merits and the award was valid but modified this award because the denial to Gypsum of corresponding deductions from employees' wages would require Gypsum to violate § 302(a) of the LMRA (29 U. S. C. § 186(a)). The District Court then gave the Steelworkers an option to withdraw their union dues demand and take instead a judgment for their attorneys' fees. The Steelworkers elected to take attorneys' fees. Judgment was entered for $8,885.00 on this issue. 339 F. Supp. 302 (1972). The Steelworkers appealed from those parts of the judgment adverse to them and Gypsum cross-appealed. On December 1, 1972 Gypsum sold the assets of the plant with specified exceptions and the Court of Appeals was advised of this fact.

The Court of Appeals held that the arbitrator could hold that the dues check off and wage reopener provisions of United's collective bargaining agreement were binding upon Gypsum, that § 302(a) of the LMRA did not make the arbitrator's check off award unenforceable, affirmed the aspects of the Trial Court's decision enforcing the arbitrator's award, reversed its refusal to enforce the wage reopener award, held that it did not appear that the District Court in awarding attorneys' fees had used the standard that Gypsum exhibited bad faith in refusing to abide by the awards and remanded the case for additional proceedings in accordance with its opinion.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Decision In This Case Conflicts With the Basic National Labor Policy Underlying the Decision of This Court In NLRB v. Burns International Security Services, Inc. (406 U. S. 272). It Conflicts With the Decisions of This Court That the Subject Matter of § 301(a) of the LMRA Requires Uniform Law.

The Court of Appeals held that the arbitrator could hold, consistent with national labor policy, that Gypsum, a purchaser of the physical assets of the plant of United and subsequent employer of the seller's employees, was bound by the check off and wage reopener provisions of the outstanding collective bargaining agreement negotiated with United, which Gypsum neither agreed to nor assumed. This holding, which underlies its decision enforcing the arbitrator's awards, conflicts with the basic national labor policy underlying the decision of this Court in *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61 (1972).

The Court of Appeals based its decision on the rationale of *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964) relative to the role of arbitration in effectuating national labor policy. It recognized the principle applied in *Burns*[3] that basic national labor policy contemplates private bargaining under Labor Board supervision of procedure alone, and does not permit official compulsion over the actual terms of a contract. It acknowledged that this principle could justifiably presage a decision that an arbitrator, operating within the same basic framework of national labor policy as the Board, does not have the power to bind the successor employer to substantive provisions of a collective bargaining agreement to which it is not a party. The Court, nevertheless, held that this basic national labor policy did not preclude the arbitrator from

3. See separate Appendix B, pp. A19-A20.

binding Gypsum to substantive provisions of United's prior existing collective bargaining agreement. It would thus establish a dichotomy by which the obligations of a purchaser of assets of a business, and new employer, under the collective bargaining agreement of the predecessor would turn upon the forum chosen for the complaint. Such a double standard is intolerable.

The arbitration was pursuant to order of the District Court. It was not a voluntary arbitration in which the arbitrator was authorized by the parties in his discretion to make an award. In such an arbitration the arbitrator's award must be governed by the same basic national labor policy which binds the NLRB and principles of law applied by the courts. The mere form of the proceeding should not change this principle (*Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 524, 32 S. Ct. 535, 56 L. Ed. 863 (1912)). As stated by this Court in *Teamsters' Local* v. *Lucas Flour Co.*, 369 U. S. 95, 103, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962), the subject matter of § 301(a) is peculiarly one which calls for uniform law.

The obligations, if any, of the new employer under the contract should be the same whether determined in a proceeding before the Board, before an arbitrator, or in a court of law. *Howard Johnson Company, Inc.* v. *Detroit Local Executive Board, Hotel etc. Int'l. Union*, No. 73-631, ... U. S. ....., 94 S. Ct. 2236, 41 L. Ed. 2d 46 (1974).

There are also conflicts in the views of the Circuit Courts of Appeal relative to the obligations of a new employer under the rationale of *Wiley*. The Ninth Circuit holds that a purchaser of assets of the predecessor employer is, under circumstances analogous to this case, bound by the entire outstanding collective bargaining agreement of the predecessor. *Wackenhut Corp.* v. *Int'l. Union, United Plant Guards*, 332 F. 2d 954 (9 Cir. 1964). The Fifth Circuit in this case and the Third Circuit in *United Steelworkers of Amer.* v. *Reliance Univ., Inc.*, 335 F. 2d 891 (3 Cir. 1964) hold that it remains for the arbitrator to determine the substantive provisions of the prede-

cessor's collective bargaining agreement that are binding on the purchaser according to the circumstances existing after the purchase. The decision in this case and of the Third Circuit in *Reliance* would in effect permit the arbitrator to make a new contract between the union and the purchaser and conflicts directly with the fundamental principle stated in *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960) that an arbitrator's award is "legitimate only so long as it draws its essence from the collective bargaining agreement".

The decision in this case and of the Third Circuit in *Reliance*, would require a purchaser who sets initial terms of employment at variance with those in the outstanding collective bargaining agreement of the seller, which the purchaser may lawfully do under *Burns* (406 U. S. 272 at 286 & 294), *to incur the risk of* having violated the provisions of the contract that an arbitrator might subsequently determine to be binding upon the purchaser, *an unfair labor practice.*

Acquisition of assets is a common way of acquiring a business and allowance of the Writ in this case will give this Court a vehicle with which to settle the uncertainties now existing under these conflicting decisions.

2. The Decision In This Case Enforcing the Check Off Award Conflicts in Principle With the Decisions of This Court In H. K. Porter Co. v. NLRB (397 U. S. 99) and In Burns. It Departs from the Contract and Conflicts With Decisions of the Second Circuit Relative to Violations of § 302(a) of the LMRA. The Check Off Award Is Capricious and Arbitrary and Penal In Character.

The Court of Appeals rejected Gypsum's defense to the check off award as "a veiled attempt to have us pass on the merits of the award" and stated that there was a difference as to the meaning and application of the check off provision of the

contract. Gypsum's position was simply that it had no authorizations from its employees to check off their union dues.

The collective bargaining agreement provided that United would "deduct union dues . . . from the pay of employee *who gives written authorization to the Company for such deduction.*" [Italics added] Absent any such authorizations to Gypsum the arbitrator's check off award does not draw its essence from the agreement. No difference as to the meaning and application of the check off provision in the contract arose before the arbitrator.

The check off award can be sustained only on the assumption that concomitant with Gypsum's obligation to honor the check off provision in the collective bargaining agreement the check off authorizations given to United by its employees became authorizations from these employees to Gypsum after they had been employed by Gypsum. Such an extension of the rationale of *Wiley* would compel Gypsum, through the intervention of an arbitrator in an involuntary arbitration, to check off union dues and conflicts with the fundamental national labor policy of private bargaining without official compulsion over terms of the contract enunciated by this Court in *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970) and in *Burns*.

Section 302(a) of the LMRA (29 U.S.C. § 186(a)) makes it unlawful for an employer to pay money to a labor organization which represents or claims to represent its employees. Payment of union dues without deduction from the wages of the employees is a contribution to the union and violates § 302(a). *NLRB* v. *Jack Smith Beverages*, 202 F. 2d 100, 101-102 (6 Cir. 1953); *T. C. Wagster, d/b/a ABC Machine & Welding Service*, 122 NLRB 944, 945 (1959); *Eastern Missouri Contractors Ass'n.*, 180 NLRB No. 83 pp. 509, 514 (1969). The Court of Appeals held however, that the purpose of § 302(a) is to protect the employer from extortion and insure honest representation of the employees and that this

objection is inapposite. Its decision conflicts with decisions of the Second Circuit that § 302(a) is to be construed broadly and covers situations that do not involve conscious wrongdoing. *United States* v. *Ryan*, 232 F. 2d 481, 483 (2 Cir. 1956); *Int'l. Longshoremen's Ass'n.* v. *Seatrain Lines, Inc.*, 326 F. 2d 916, 920 (2 Cir. 1964); *Moglia* v. *Geoghegan*, 403 F. 2d 110, 115 (2 Cir. 1968).

The Court of Appeals held that § 302(c) (2) excepts an arbitrator's award from the provisions of § 302(a), that the arbitrator's check off award was within the remedial powers of the arbitrator and lawful and reversed that part of the District Court's judgment which held that the arbitrator's denial to Gypsum of the right of recoupment from employees' wages violated § 302(a). Section 302(c) (2), however, contemplates a bona fide award of an arbitrator other than the check off of union dues and the decision of the Court of Appeals in this case conflicts in principle with that of the Second Circuit in *Int'l. Longshoremen's Ass'n.* v. *Seatrain Lines, Inc.*, 326 F. 2d 916, 919 (2 Cir. 1964), holding that § 302(c) (4) provides the exclusive method by which employers may contribute to the general purpose funds of unions. Also, the arbitrator's denial to Gypsum of corresponding deductions from the employees' wages for checked off union dues departs from the contract and is penal in character.

Gypsum's letter of May 28, 1965 replying to the grievance stated that it "has not made dues deductions because it has no authorizations from employees to do so". (*supra*, p. 5) The arbitrator was aware of this defense for he quoted this letter in his report. Despite this fact he rejected this defense as an "afterthought" which "came too late" and stated it could easily have been remedied by the Steelworkers if it had been made at the time of the grievance. Nevertheless the Court of Appeals held this decision was within the jurisdiction of the arbitrator to interpret the contract and that his decision was not capricious or arbitrary. The national labor policy encouraging settlement

of labor disputes through arbitration will be unproductive unless arbitrators are held by the courts to integrity in their findings of fact and sound principles of law.

3. The Decision In This Case Enforcing the Arbitrator's Wage Increase Award Conflicts With the Basic National Labor Policy of Freedom of Contract Underlying the Decision of This Court In H. K. Porter Co. v. NLRB (397 U. S. 99). It Conflicts In Principle With the Decisions of This Court In Teamsters Local v. Lucas Flour Co. (369 U. S. 95) and Howard Johnson Company, Inc. v. Detroit Local Executive Board, Etc. (94 S. Ct. 2236).

The reversal by the Court of Appeals of the District Court's refusal to enforce the wage increase award conflicts with the policy of freedom of contract underlying the decision of this Court in *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970). That decision was distinguished by the Court of Appeals as "concerned with the remedial power of the Board".[4] It held the crucial distinction to be that Gypsum refused to bargain, a breach of contract for which the arbitrator could award compensation although he could not order an agreement for the parties or add to the terms of the contract.

Prerequisite to awarding compensation, however, the arbitrator must find that the negotiations would not have resulted in an impasse but in a wage increase. His award thus has the effect of creating a past contractual provision not supported by agreement of the parties and not required by law, a clear departure from the national labor policy of freedom of contract enunciated in *H. K. Porter.*

Although the Court of Appeals treats the wage increase award as damages it was truly a wage increase to Gypsum's employees, regardless of the period during which they were employed by Gypsum. The arbitrator, as found by the District

4. See separate Appendix B, pp. A27-A28.

Court, thus added a new wage scale to the collective bargaining agreement, a matter expressly excluded from his jurisdiction. "Of course, the Union may not use arbitration to acquire new rights . . . any more than it could have used arbitration to negotiate a new contract . . . had the existing contract expired and renewal negotiations broken down." *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 555, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964).

The Steelworkers had a remedy for the alleged violation of the reopening clause by Gypsum through a charge of refusal to bargain which they filed with the NLRB but withdrew in the hope of securing a decision that the contract was binding on Gypsum. The Court of Appeals would now give the Steelworkers through the intervention of an involuntary arbitration proceeding a remedy which could not be obtained through the NLRB. *Culinary Alliance & Bartenders U., Local 703* v. *NLRB*, 488 F. 2d 664, 666 (9 Cir. 1973). In other words, the remedy would depend on the forum chosen for the complaint. This conflicts in principle with the decisions of this Court in *Teamsters' Local* v. *Lucas Flour Co.*, 369 U. S. 95, 103, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962) and *Howard Johnson Company, Inc.* v. *Detroit Local Executive Board, etc.*, No. 73-631, ... U. S. ..... 94 S. Ct. 2236, 41 L. Ed. 2d 46 (1974) which emphasize the need under § 301(a) for uniform law.

A provision for reopening a collective bargaining agreement mid-term for negotiation of wages is common in collective bargaining agreements. Clarification by this Court of the rights and remedies of employers and employees under such a provision would materially assist in the stablization of labor relations nationally.

4. The Decision In This Case Enforcing the Wage Increase Award Violates Amendment V to the Constitution of the United States. A Possible Wage Increase Was Never Arbitrated. Enforcement of This Award Deprives Gypsum of Due Process of Law.

The Court of Appeals held that Gypsum's defense to the wage increase award raised a procedural prerequisite and that the arbitrator's decision on that issue was final. It reversed the District Court's refusal to enforce this award.

The time to reopen the contract had not arrived when the grievance was presented. After that time had arrived no grievance was submitted thereon. No evidence of the service of a notice to reopen the contract was presented by the Steelworkers to the arbitrator. No evidence or argument relative to Gypsum's obligation, if any, to grant a wage increase or the amount of a wage increase that might have been negotiated was presented to the arbitrator by either party. No one requested an award of a wage increase. The fact is that the issue of a possible wage increase was never arbitrated and the question of procedural prerequisites to negotiations for a wage increase did not arise before the arbitrator.

Despite the fact that the issue of a possible wage increase was not arbitrated the Court of Appeals further held that there was certainly a difference as to the interpretation of the reopening clause. There was no issue before the arbitrator as to the meaning of the reopening clause. The Steelworkers' post hearing brief requested that the term of the contract be extended by the arbitrator for a period commensurate with the time that Gypsum had refused to honor the same. Gypsum contended that the contract was not binding on it. A wage increase award did not naturally flow from the reopening provision. *Kansas City Luggage & Nov. Wkrs.* v. *Neevel Luggage Mfg. Co.*, 325 F. 2d 992, 993 (8 Cir. 1964). Calling it a matter of contract interpretation does not change the situation. *Radio Corp. of*

Am. v. *Association of Scientists & Pro. Eng. P.*, 414 F. 2d 893, 896 (3 Cir. 1969).

The arbitrator decided that the remedy requested by the Steelworkers was not feasible because of the Steelworkers decertification and that the possible wage increase was the remedy. Under the circumstance he should have afforded the parties an opportunity to be heard on the matter. Instead, he arrogated to himself an issue not litigated by the parties in the arbitration and rendered an award in an amount determined on his own research. This award does not satisfy the rudimentary principles of fairness essential to a valid court ordered arbitration and is void for want of due process. *Dewey* v. *Reynolds Metals Company*, 291 F. Supp. 786, 790 (1968), 304 F. Supp. 1166, Rev. 429 F. 2d 324 on other grounds; *J. C. Penney Co.* v. *NLRB*, 384 F. 2d 479, 483 (10 Cir. 1967).

5. The Decision In This Case Raises Issues of Fundamental Importance to Labor, Business and Industry and Which Are Also Important In the Administration of the LMRA.

The conflicts between the decision of the Court of Appeals in this case and the decisions of this Court and decisions of other Courts of Appeal and the errors in said decision raise important questions of law which are of concern to a broad segment of labor, business and industry. They are also of importance in the administration of the LMRA.

The extent to which an arbitrator may hold a purchaser of a business bound by the provisions of a collective bargaining agreement negotiated with the seller is a significant factor in nearly every business acquisition in which the seller has a viable collective bargaining agreement, whether the acquisition is by purchase of assets or otherwise. The serious inequities which may arise from holding a new employer bound by substantive provisions of such a collective bargaining agreement, including the inhibiting of transfers of capital, the tying of a union to a disadvantageous contract, the new problems that may arise

for the successor employer relative to replacement of employees, seniority rights, wages, subcontracting practices, fringe benefits, pension rights, and the possible refusal of the union to negotiate changes, have been pointed out by this Court in *Burns* (406 U. S. at 287-90) and emphasize the need for clarification of the conflicting decisions relative to the obligations of a new employer under all or any of the provisions of such a collective bargaining agreement.

The question of whether an arbitrator is bound by the basic framework of national labor policy and the rules of law applied by the courts is important in the administration of the Act. The National Labor Relations Board defers to arbitration only if the proceedings are fair and regular and not repugnant to the purposes and policies of the Act. *Banyard* v. *NLRB*, No. 73-1610, ... F. 2d ..... (D. C. Cir. Aug. 14 1973). Also if the arbitrator is not so bound employers and labor organizations will be hesitant to include an arbitration provision in their collective bargaining agreements and the role of arbitration in effectuating national labor policy will be lessened.

The questions raised herein relative to the validity of the arbitrator's awards for the check off of union dues and the wage increase under the reopening clause in the predecessor's contract are important to the NLRB as well as to employers, labor organizations and employees, for any violation of a provision of the contract is an unfair labor practice. All of these considerations and others illustrate the urgent need for this Court to settle the existing uncertainties in the law relative to the obligations of a new employer under the collective bargaining agreement negotiated with the predecessor. The importance of these questions is further emphasized by the fact that the Chamber of Commerce of the United States of America has requested that petitioner consent to the granting of its application to this Court for leave to file a brief as amicus curiae in this proceeding.

Of particular importance to the continuance of a free enterprise economy is the need for uniformity in the decisions of the

various authorities having jurisdiction to determine the contractual power of a buyer of assets of a business to specifically exclude from the purchase a viable collective bargaining agreement negotiated with the seller. If such authorities can apply their own law (to paraphrase the words of Daniel Webster) there can be no general permanent law for courts to administer or employers, employees and labor organizations to live under.

CONCLUSION.

For the reasons hereinbefore stated it is respectfully submitted that the writ of certiorari prayed for herein should be granted.

Respectfully submitted,

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-248

UNITED STATES GYPSUM COMPANY,
Petitioner and Defendant-Appellee-Cross-Appellant Below,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Plaintiff-Appellant-Cross-Appellee Below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION.

INTEREST OF THE AMICUS CURIAE.*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and

* Consents of all parties to the participation of the amicus in this proceeding have been filed with this Court.

professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' view on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court and Courts of Appeals.*

The instant case raises issues of fundamental importance for a significant number of the Chamber's members in the ordinary conduct of their businesses.

The underlying issue presented here is whether a purchaser of an ongoing business enterprise may be compelled to accept his predecessor's labor contract in part or in its entirety when he has not consented to be bound by this agreement. The decision below involves not only the enforcement of an arbitral award, following a judicial determination that the purchaser was obliged to arbitrate, but in addition, stands as authority that an arbitrator may require an unwilling purchaser to adopt the substantive terms of the seller's contract with a union. The court below based its decision on rehearing in part upon its reading of this Court's opinion in *Howard Johnson*, ... U.S. ....., 94 S.Ct. 2236 (1974).

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* *Howard Johnson Company Inc.* v. *Detroit Local Executive Board Hotel, etc. International Union*, ... U. S. ...., 94 S.Ct. 2236 (1974); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *N.L.R.B.* v. *Textron, Inc.*, ... U. S. ...., 85 LRRM 2945 (1974); *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213, 34 L. Ed. 2d 422 (1972); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *Sears, Roebuck and Co.* v. *Carpet Layers, Local* 419, 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, ... U.S. ...., 85 LRRM 2913 (April, 1974), *N.L.R.B.* v. *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, ... F. 2d ...., 86 LRRM 2541 (CA 3, 1974); *Scott Hudgens* v. *N. L. R. B.*, No. 73-3264 (CA 5, 1973).

In *Howard Johnson* this Court appeared to suggest that under *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), a purchaser could be compelled to arbitrate pursuant to the terms in his predecessor's labor contract if he retained virtually intact the represented employees of his predecessor. The practical effect of *Wiley* is to impose in whole or in part the terms of a seller's labor contract upon a non-consenting buyer—just as occurred in the instant case. Thus, it should be determined whether continued homage to *Wiley's* rationale, even in this limited respect, contravenes clear Congressional purpose as reflected in the National Labor Relations Act (29 U.S.C. Sec. 141, *et seq.*) and as enunciated by this Court in *N.L.R.B.* v. *Burns International Security Services, Inc.* (406 U.S. 272 (1972) and *H. K. Porter Co.* v. *N.L.R.B.* (397 U.S. 99 (1970)). In addition, it should be decided if the precepts of *Burns* without resort to *Wiley* are wholly sufficient to protect employee interests, and whether continued adherence to *Wiley* may well produce deleterious consequences for the industrial community, including employees who may otherwise have an opportunity to survive a change of company ownership. Thus, a potential purchaser who desires to enjoy flexibility while operating the purchased enterprise may well be forestalled from consummating his intended purchase or foreclosed from hiring his predecessor's employees in order to avoid being tied to his predecessor's labor contract pursuant to the reach of *Wiley*.

A second issue raised for review is whether an arbitrator may inflict a penalty upon an employer when the Labor Board would be statutorily banned from doing so. This issue, just as the first, requires an examination of the value of a uniform labor policy regardless of the forum selected to resolve a dispute.

The matters raised by this case are of grave and national concern since the ability of employers generally to invest in businesses and make necessary changes in personnel, practices and policies in order to insure productivity is unduly restricted by compelling them to arbitrate under the terms of the predecessor's labor agreement.

Since the Chamber's membership consists of numerous employers who frequently and regularly are in a position to acquire or sell ongoing businesses, and who must therefore know their rights and duties in this area, the Chamber is vitally concerned about the manner by which these questions will be resolved by this Court. Further, because of its broad representation of employers, the Chamber is in a position to present arguments to this Court concerning the questions involved herein which might not otherwise be advanced by the parties.

REASONS FOR GRANTING THE WRIT

A. Introduction

The Petitioner, Gypsum, purchased the plant and the assets of another company, United, expressly excepting from this purchase United's labor obligations. Gypsum retained all but three of United's employees and operations continued at the same location without substantial change or appreciable hiatus. Though a collective bargaining agreement existed between United and the United Steelworkers of America covering the employees who survived the change in ownership, Gypsum declined to assume the terms or obligations of this agreement. After a lengthy dispute, the court below affirmed a district court's judgment requiring that Gypsum and the Union arbitrate concerning the survival of the pre-existing contract, including terms relating to the impact of the sale upon seniority and the dues check-off.[1] Following this ruling by the court, the arbitrator held that Gypsum was bound by the *entire* contract made between United and the Union; ordered that a new wage scale be put into effect pursuant to a wage reopener; and required Gypsum to pay to the Union an amount equal to an alleged check-off obligation without the right of recoupment from em ployees. Subsequently, the court below, relying upon this Court's

1. *United States Gypsum Company* v. *United Steelworkers of America, AFL-CIO,* 384 F. 2d 38, cert. den. 389 U.S. 1042 (1972).

decision in *Wiley*,[2] held that the arbitrator's award was within his discretion and powers.

This Court has previously confronted the obligations of a purchasing employer to the employees of his predecessor.[3] In *Howard Johnson*, this Court attempted to effect a balance between two judicially recognized and distinct interests pulling in opposite directions: the interest of a new employer to operate the purchased enterprise with necessary business flexibility and with his own independent labor force; the interest of the predecessor's employees who were hired by the purchaser to be protected from sudden changes in their terms and conditions of employment. The balance struck by this Court in *Howard Johnson* has further narrowed the perimeters of *Wiley*, as this Court appears to have (i) restricted its principles to situations where there existed a substantial continuity in the identity of the labor force before and after the ownership change and (ii) determined to shield only those employees who are retained by the purchaser from sudden alterations in their working conditions.

The *amicus* submits, however, that the employees who are retained by a purchasing employer may, consistent with this Court's concern, be sheltered from changes in their working conditions by the principles enunciated in *Burns*, without recourse to *Wiley*, and that consequently the retention of *Wiley's* precepts no longer contributes positively to the nation's labor policy. Indeed, *Wiley's* principles are diametrically opposed to this policy as reflected in Section 8(d) of the National Labor Relations Act. Accordingly, this cause presents to this Court an ideal vehicle to explore whether the directives of *Wiley* need now be accorded any deference in view of the protections afforded by *Burns* both to employer and employee interests.

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2. *John Wiley & Sons, Inc.* v. *Livingston, supra.*

3. *N.L.R.B.* v. *Burns International Security Services, Inc., supra, John Wiley & Sons, Inc.* v. *Livingston, supra, Howard Johnson Company, Inc.* v. *Detroit Local Executive Board, Hotel, etc. International Union, supra.*

B. The Principles Promulgated in Burns Provide Ample Protection for Employees Who Survive an Ownership Change and Unlike Those Enunciated in Wiley Are in Accord with the Nation's Labor Policy

1. The Principles of Burns Protect the Rights of Employees

In *Burns* this Court articulated the principle that where a purchasing employer plans to retain all of his predecessor's unionized employees he must consult with the bargaining representative of those employees before he fixes initial terms of employment. Furthermore, this Court in *Burns* held that even where a purchaser does not initially retain all of his predecessor's employees, he will nonetheless be obliged to bargain with their representative at or about the time he begins operations if he has then hired a full compliment of employees and a majority of these had been employed by the predecessor and there represented by the union presently seeking bargaining rights.[4]

It is evident that this Court in *Burns*, just as in *Howard Johnson*, sought to afford protection to employees who survive a change in business ownership from unanticipated shifts in their employment conditions. Reading *Burns* together with the restrictions imposed upon *Wiley* by *Howard Johnson*, it is submitted that the principles of *Burns* without resort to those of *Wiley* satisfy this Court's concern for these surviving employees.

4. The union will be presumed to represent a majority of the purchaser's employees and unless he can overturn this presumption he will be required to recognize and negotiate with the union. This essentially was the fact situation in *Burns*, since a majority of the employees hired by the new employer consisted of employees who had worked for the predecessor. These employees performed the same functions as they had with the precessor, with little interruption in their employment. Thus, "Burns' obligation to bargain . . . stemmed from its hiring of [the predecessor's] employees and from the recent election and Board certification . . . the 'source of [Burns'] duty to bargain with the Union is not the collective bargaining contract but the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year." 406 U.S. 272, at 278-279, 287.

Where a purchasing employer determined to retain and thereafter hired intact virtually the entire unit of his predecessor, the employees are guarded from sudden changes in their working conditions by the *Burns* rationale without recourse to the arbitral protections contained in *Wiley*. That is, adhering to the lesson of *Burns*, a new employer who plans to and does retain all of the employees of his predecessor's unit must also preserve their existing working conditions as he begins his new operation until he has negotiated with the bargaining representative of these employees. It follows that independent of *Wiley's* mandate to arbitrate, there can be no abrupt and unanticipated change in the terms and conditions of employment of the employees who survive the ownership change, and this Court's concern for these employees has been satisfied without resort to the arbitral demands of *Wiley*.

It is not apparent that this Court in *Howard Johnson* intended that the principles of *Wiley* be extended beyond the factual situation just discussed. However, it is submitted that even in the distinct factual situation presented by the *Burns* decision itself, the precepts of that decision afford ample protection to those employees who are hired by the purchaser. That is, when as in *Burns* a new employer while preparing to begin his operations hires his work force gradually, he may lawfully set his initial terms of employment without consulting with the labor organization representing his predecessor's employees; under *Burns*, only when he has hired his full compliment of employees and a majority of these consists of his predecessor's workers, does his bargaining obligation arise. This bargaining duty satisfies the employee rights recognized by this Court as valid in the successorship area. Where a new employer has no obligation under the Labor Act to negotiate with a union before fixing initial terms of employment even though these terms may differ from those of his predecessor, there can exist no obligation to arbitrate before setting these terms if the consistency in labor policy envisioned by this Court in *Howard Johnson* is to be

achieved. Thus where this Court would not require an employer to bargain before implementing his initial employment terms, it should not obligate him to arbitrate pursuant to his predecessor's contract and thereby forestall him from formulating these terms. To require arbitration under Section 301 but to permit unilateral imposition of hiring terms under Sections 7 and 8(a)(5) of the Labor Act would be to permit an employer's duty to depend upon a union's choice of forum. Such a result would be inconsistent with this Court's mandate in *Howard Johnson*.[5]

Furthermore, in a factual situation where the purchasing employer may lawfully set his initial terms of hire, as described above, his employees will not likely be subjected to sudden or unexpected changes in their working conditions after the purchaser's bargaining obligation later arises. Rather, that employer, following *Burns*, will likely seek to maintain the conditions he has initially set and fulfill his obigations to bargain with the representative of his empoyees before altering these terms.

As demonstrated above, there is no underlying need to retain the arbitral protection mandated by the precepts of *Wiley*. Furthermore, the continued vitality of the decisional precedent of *Wiley* may well discourage continuity in employment relationships. That is, a cautious purchaser, normally amenable to hiring his predecessor's employees and negotiating with their union to shape future relationships may instead opt to hire a new work force in order to maximize operating flexibility, rather

5. In *Howard Johnson* this Court recognized that the federal common law regarding the enforcement of collective bargaining agreements must be

> "fashion[ed] from the policy of our national labor laws . . . It would be plainly inconsistent . . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the Courts in a suit under Section 301, and thus to permit the right enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims." 42 U.S. L. W. 4834, 4836.

than to retain his predecessor's employees and to risk an arbitrator's award saddling him with the ossified contractual obligations of that former employer.[6]

2. The Principles of Wiley Contravene Congressional Intent, National Labor Policy and Subsequent Decisions of This Court

The nation's labor policy as reflected by Section 8(d) of the Labor Act and by congressional commentaries repudiates compelling a party to agree to substantive contractual obligations and instead manifests a clear intendment that bargaining agreements should be consentual, the result of voluntary negotiations between the contracting parties who must live under the terms of the agreement reached. Thus, the relevant portion of that statutory section states that while there is a duty imposed upon parties to bargain in good faith, neither party in the negotiations must agree to a proposal or make a concession. This Court has explicitly confirmed its acceptance of that statutory section when in *Burns* it stated.

> "Congress has consistently declined to interfere with free collective bargaining and has preferred that device, or voluntary arbitration, to the imposition of compulsory terms as a means of avoiding or terminating labor disputes." 406 U.S. at 282.[7]

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6. An employer who is willing to adhere to his statutory bargaining obligations but who nonetheless decides not to hire his predecessor's employees in order to avoid being bound to a pre-existing contract by an arbitral award under *Wiley* would seem to be acting lawfully. Thus, the Labor Act imposes no obligation upon an employer to agree to substantive contract terms. To be distinguished is a situation where an employer unlawfully refuses to hire his predecessor's employees solely because they are union members or in order to avoid having to bargain with the union. *Howard Johnson, supra,* note 8.

7. This Court has more recently stated that there exists "an important labor policy opposed [to] [re]quiring the successor employer with the obligation of the [predecessor's] labor agreement." *Golden*

To accord continued vitality to *Wiley*, however narrow its current perimeters, is to contravene the congressional scheme endorsing voluntary collective bargaining but disavowing compelled agreements. Thus, while *Wiley's* requirements of arbitration may not on their face enjoin a new employer to honor other substantive terms of his predecessor's contract, the practical effect of *Wiley's* dictates is to infuse the predecessor's contractual obligations upon the operations of the purchaser, since the arbitrator will undoubtedly find that the predecessor's contract survived the change in ownership in its entirety.[8] Retention of *Wiley's* directives then effects indirectly what Congress has expressly proscribed by Section 8(d) of the Labor Act.[9]

This position is illustrated by the decision below. Thus, the court below upheld an award requiring the Petitioner not only to abide by his predecessor's entire contract but, in addition, to pay wages retroactively accordng to a new wage scale forged by the arbitrator and to give to the Union a sum equivalent to dues that might have been "checked off", despite the fact that no bargaining agreement required either of these latter two obligations. This award is barred by the policy underpinning Section 8(d) of the Act and by the rationale of this Court's decisions in *Burns* and *Porter*. The court below attempted to distinguish *Porter* from the instant case by

State Bottling Company, Inc. v. *N.L.R.B.*, 414 U.S. 168 (1973), 42 U.S. L. W. 2039 at p. 4044. This Court has consistently maintained this view; *H. K. Porter* v. *N.L.R.B. supra*, held that the Labor board could not require an employer to accept a union dues check-off provision in his labor contract, even though the employer steadfastly refused to negotiate about this clause.

8. As an example, the arbitrator in *Elesco Smelting Corp.* (56 LA 1256 (1971)) required the successor to pay holiday bonuses, though such payment would cause substantial economic hardship, where the predecessor had for many years made these payments. And the arbitrator in the instant case, as will be discussed *infra* similarly held the purchaser—the Petitioner—bound by the entire contract. The safety valve of judicial review is of little utility since, just as did the court below, courts narrowly examine arbitration awards.

9. See footnote 5, *supra*.

observing that in *Porter* the parties had reached the bargaining table before the employer refused to negotiate, while here the Petitioner refused even to "sit down at the bargaining table and negotiate." A-28. The court below also stated that unlike *Porter*, where the Board ordered the employer to sign a contract containing a term the Union had been unable to secure in negotiations, the arbitrator's award below simply compensated the Union for the Petitioner's contract breach. A-27, 28.

To state this purported distinction is to demonstrate its untenability. There is no distinction between the relief barred by *Porter* and the remedy that the court below suggests that the arbitrator has power to impose. In either case the employer has not agreed to the wages and other employment conditions which are imposed upon him and for which he is as fully responsible as if he had agreed to them. Then, too, though the award of wages may be dubbed compensation to remedy a contract breach (as it is by the court below), the payment to employees is similar to benefits that would be produced by the retroactive imposition of contract terms. The major premise of *Porter* is that the Board may not dictate the substantive terms of employment that will govern the bargaining relationship of the parties. Consequently, by awarding wages and check-offs which were not agreed to by the Petitioner, and by imposing the entire pre-existing contract on him without his consent, the arbitrator and the court below accomplished what *Porter*, recognizing the will of Congress, prohibits.

Whether the Court-enforced arbitral awards comprehend infusing the pre-existing contract in its entirety or only in part upon the operations of a non-consenting purchaser is not material. To enforce either type of award contravenes Congress' intent.[10] Moreover, neither is suited to diminish industrial discord. That is, to judicially approve an award inflexibly binding a purchaser

10. To compel a purchaser to honor even the arbitration terms of his predecessor's contract is to require him to adopt a substantive term and thereby conflicts with congressional purpose.

to his predecessor's entire contract is to fail to consider that manifold changes in employment relationships accompany any change in ownership due to the distinct policies and operational methods of the seller and buyer. Indeed, the possibility of being chained by the pre-existing contract as a result of an arbitrator's award may well forestall the purchase or, as stated, foreclose the retention of the predecessor's employees. To permit an arbitrator to select which terms of the old contract will bind the new employer is no more satisfactory. A collective bargaining agreement must be viewed as a whole, as a blend of give and take achieved through voluntary negotiations, with each term interdependent. Thus, the existence and quality of each benefit depends upon the presence and amount of others and upon reciprocal employee obligations. To permit an arbitrator to decide which of these interdependent terms survive to bind a purchaser is to allow a contortion of the agreement initially reached and to produce a document not reflective of the concerns of the contracting parties, including those employees who survived the ownership change. It is evident that the purchaser and his employees should be left to work out their current problems over the bargaining table. The result achieved will better mirror the present interests of the parties who must be governed by the agreement and thereby contribute to a durable bargaining relationship and industrial harmony.

Further, if contract terms are imposed under the guise of compensation or otherwise, these terms will inevitably serve as a floor from which bargaining for subsequent contracts will begin. The initial infringement upon the collective bargaining process has thus been reinforced. Accordingly, this Court should now review and reverse the decision below since it endorses an arbitration award that conflicts with the established labor policy enunciated by this Court in *Porter, Burns* and *Howard Johnson.*

It is evident from the foregoing that *Wiley*, despite the foregoing decisions, continues to present significant problems in the business acquisition area of labor relations. On the one hand, its precepts are not required to shelter the judicially recognized

rights of employees who survive an ownership change; on the other, continued deference to *Wiley's* rules serves only to frustrate employers as they seek to acquire businesses and to operate them with the freedom necessary to insure their success for the benefit of management and employees alike. Independently, *Wiley* conflicts with a transparent intent of Congress as manifested by Section 8(d) of the Labor Act. The instant cause represents a means for this Court to examine and resolve the on-going problems caused by the continued existence of *Wiley*. The Chamber submits that a viable alternative to the present rules would permit the substantive terms of a pre-existing contract to survive, whether by arbitration award or Labor Board decision, only if the new employer demonstrates an intent —other than by hiring the predecessor's employees—to be bound by those terms. Adoption of this alternative would prevent further violence to the commands of Section 8(d) and simultaneously shield employees from sudden changes in their working conditions to the extent countenanced by *Burns*.[11]

C. The Decision Below Sanctions an Award That Exceeds the Authority Conferred Upon Arbitrators

Independently of the reasons set forth above, this Court should grant the petition since the decision below sanctions an award that was given in excess of the arbitrator's authority. That is, the portion of the award relating to the "check off" is a grant of damages or the infliction of a penalty; as such, it may not be conferred by an arbitrator since he may not do what the nation's labor policy as reflected in the Labor Act prohibits if the uniform labor policy as endorsed by this Court in *Howard Johnson, supra,* and *Textile Workers* v. *Lincoln Mills* (353 U. S. 448 (1957)) is to be realized.[12]

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11. Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 Minn. L. Rev. 1051, 1102.

12. Note particularly the discussion of *Porter* in Section B2 *supra* to the effect that no arbiter, whether administrative agency,

As this Court has recognized:

> "The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with backpay." *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 665 (1954.)

The limitation on remedial power under the Labor Act was highlighted in the *Republic Steel* case.[13] There, this Court refused to enforce a Board order that required an employer to pay sums of money to third parties in addition to paying compensatory backpay to his employees. In that case, the Board had directed the employer to deduct from back wages due to wrongfully discharged employees, the amounts they had received from governmental agencies that had employed them on relief projects, and to then pay the deducted sums to the Government. In reaching its decision that reimbursement to third parties was not sanctioned by the Labor Act, this Court held that such payments amounted to "an exaction neither to make the employees whole nor to assure that they can bargain collectively with their employer through representatives of their own choice." at pp. 12-13.[14]

The award below requiring the Petitioner to pay dues to the Union, just as the relief forbidden in *Republic*, has nothing to do with making employees whole for any losses, and instead, is an exaction of damages. Accordingly, since an arbitrator's awards must be fashioned in harmony with national labor policy, an

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court, or arbitrator can require a party to agree to a collective bargaining agreement, in whole or in part where that party does not consent to be bound.

13. *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7 (1940).

14. Congressional commentaries endorse the position that damage awards are excluded from the arsenal of remedies under the Act. *E.g.*, 93 Cong. Rec. 4858 (1949). McGuiness, *Is the Award of Damages for Refusals to Bargain Consistent with the National Labor Policy?* 14 Wayne L. Rev. 1086 (1968).

arbitrator similar to the Board is proscribed from awarding damages. It follows that the Court below erred in enforcing the check-off award granted in the underlying arbitration proceeding.

Furthermore, whether or not the check-off award is considered to be "damages", the arbitrator's asserted power to shift costs from employees to the employer can be justified only if he is authorized to inflict penalties, since payments to the union are wholly unrelated to making employees whole and only serve to punish the employer.

It is acknowledged that the Labor Board has no power to fix a penalty upon an employer whether the penalty is designed to rectify past or to curb future conduct. Thus, this Court has interdicted the Board from assessing penalties against persons who have committed unfair labor practices, even if the infliction of such punitive relief would foster the policies of the Act. In the words of this Court:

> "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties of fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive." *Republic Steel Corp. v. N.L.R.B., supra,* at pages 11, 12.

Since this Court has supported uniformity in labor policy, as heretofore discussed, just as a Board order may not inflict penalties, neither may an arbitral award; consequently, for this

additional reason the check-off award may not be sustained and the court below must be reversed by this Court.[15]

CONCLUSION

For the reasons set forth above, and for those urged by the Petitioner, it is respectfully submitted that the writ of certiorari prayed for herein should be granted.

Respectfully submitted,

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15. The same arguments can be advanced with respect to any effort to require an employer to reimburse the Union for its litigation costs, as was the subject of this Court's recent *Heck's, Inc.* decision (*N.L.R.B.* v. *Food Store Employees Union*), ... U.S. ...., 86 LRRM 2209 (1974). Note also *Tiidee Products, Inc.*, 426 F. 2d 1243 (CA DC, 1970) where the court, despite recognizing that the N.L.R.B. has wide remedial latitude, refused to order a remedy that would require the imposition of contract terms containing benefits that allegedly would have been paid but for illegal conduct where the employer had not agreed to these benefits.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-248

UNITED STATES GYPSUM COMPANY,
Petitioner,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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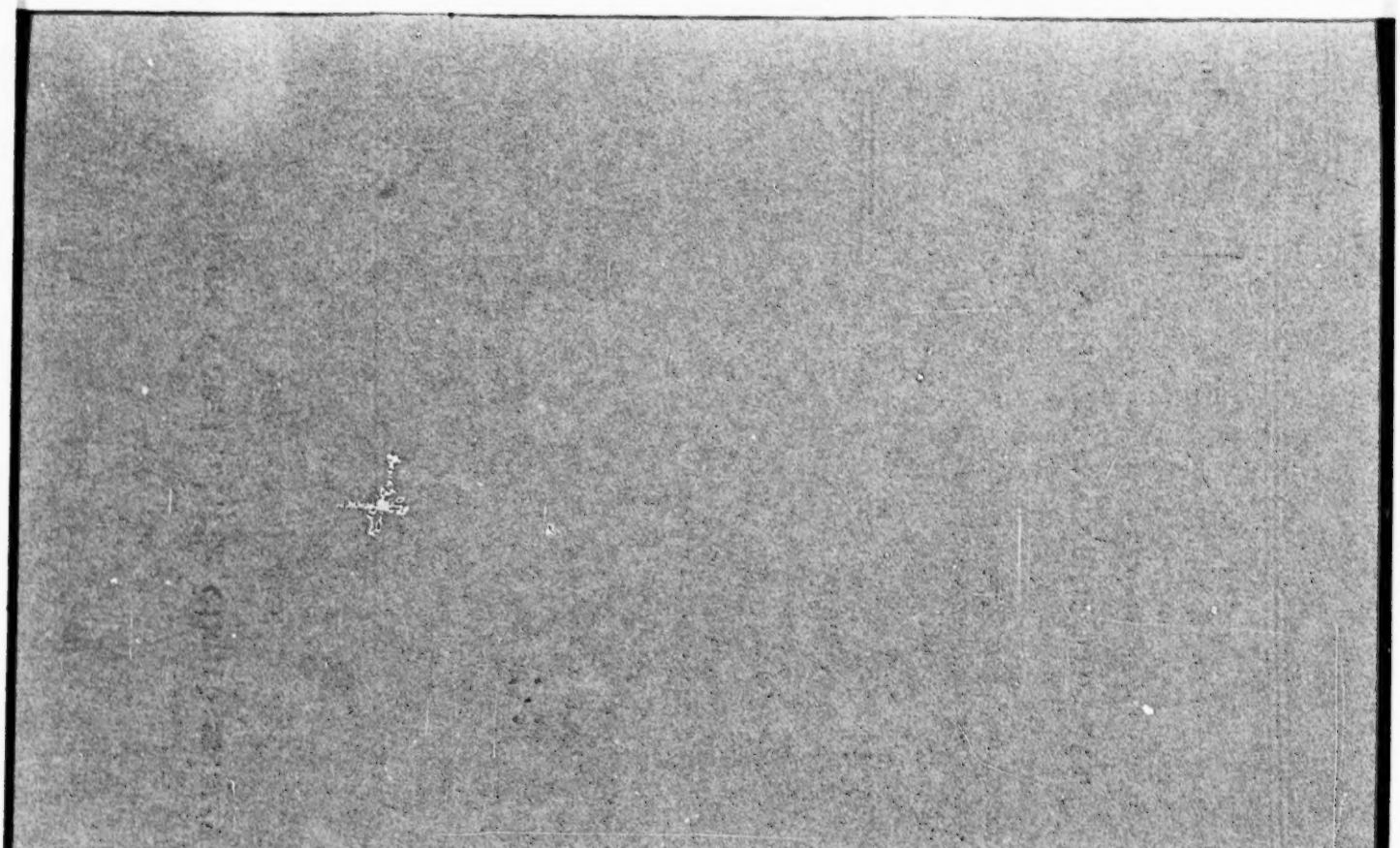

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BRIEF IN OPPOSITION

Respondent, United Steelworkers of America, AFL-CIO (the Union), believes that the opinion and judgment below are clearly correct and that review by this Court is not warranted.

COUNTER-STATMENT OF THE CASE

Petitioner (the Company) purchased the plant in question on April 1, 1965. At that time a collective bargaining agreement was in effect between the Union and the selling company which was not due to expire until March, 1967. That agreement contained, *inter alia,* a provision for the arbitration of grievances, a checkoff clause, and a provision

for a wage reopener in 1966. After purchasing virtually all of the assets and properties of the seller, the Company hired all but three of the seller's employees and continued operating the plant with the "same work force, same plant, same process, same product (except for trade name), under the same supervisors." (Appendix, A3).

Although the Company had sought to avoid assuming the collective bargaining agreement when it purchased the plant, the purchase occurred less than a year after this Court's decision in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964), holding that a company purchasing a plant and continuing the operations virtually unchanged is bound to arbitrate grievances arising under its predecessor's collective bargaining agreement.

Immediately after purchasing the plant, the Company declared that it did not regard itself bound by the collective bargaining agreement, and proceeded to take actions which the Union believed to be in violation of that agreement. Accordingly, the Union filed a number of grievances under the agreement. When the Company refused to arbitrate those grievances, the Union brought an action under Section 301 of the LMRA to enforce arbitration. The district court ordered arbitration on the basis of *Wiley,* and the Court of Appeals affirmed, 384 F.2d 38 (5th Cir. 1967). The Company sought review from this Court, urging that *Wiley* should be overruled. This Court denied certiorari, 389 U.S. 1042 (1968).

The grievances were arbitrated before one of the leading arbitrators in the United States (A2 n.2), who rendered a 116 page opinion and award. He ruled that the Company was bound by the reopener and checkoff provisions of its predecessor's agreement, and that it violated those provisions by refusing to negotiate when the Union served a reopening notice, and by refusing to check off Union dues. The arbitrator concluded that it would be inappropriate to order belated negotiations pursuant to the reopener; five years had

passed, and the Union had been decertified in the interim. Instead, the arbitrator decided that the appropriate remedy for the Company's refusal to negotiate was to make the employees whole for the wage increase which they could reasonably have been expected to obtain had the Company not refused to negotiate. To remedy the breach of the checkoff clause, the arbitrator directed the Company to pay to the Union the dues which it would have received up to the date of its decertification. The arbitrator further ruled that the Company could not recapture these dues from the employees, as its refusal to honor the agreement or deal with the Union had deprived the employees of the representational services to which they were entitled.[1]

The Union instituted this lawsuit to enforce the arbitrator's award, and the court below, in a careful and well-reasoned opinion (A1-A39), upheld the award in its entirety.

ARGUMENT

As we show below, the Company has advanced no arguments warranting review by this Court.

1. The Company's principal argument is that purchasers should not be held bound by any of the provisions of their predecessors' collective bargaining agreements, even where (as here) they continue the operations unchanged and retain the seller's employees. That contention would, of course, require a reversal of *Wiley*, the very result which the Company sought unsuccessfully in its earlier petition for certiorari.

On two recent occasions, this Court has been asked to reverse *Wiley* and has declined to do so. *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Howard Johnson Company, Inc.* v. *Detroit Local Execu-*

[1] This award was not, of course, a windfall to the Union, which had expended considerably more than the dues awarded to enforce the employees' rights under the reopener provision.

tive Board, ——U.S.——, 42 L.W. 4834 (1974). The decision below fully comports with *Wiley, Burns,* and *Howard Johnson.* As recognized in the Brief Amicus Curiae of The Chamber of Commerce (p. 3):

> "In *Howard Johnson* this Court appeared to suggest that under *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964), a purchaser could be compelled to arbitrate pursuant to the terms in his predecessor's labor contract if he retained virtually intact the represented employees of his predecessor. The practical effect of *Wiley* is to impose in whole or in part the terms of a seller's labor contract upon a non-consenting buyer—just as occurred in the instant case."

Neither the Company nor Amicus has advanced any considerations which were not before this Court at the time of its recent *Howard Johnson* decision and, accordingly, there is no reason why this Court should again review this issue.

2. The Company argues that the arbitrator's "make whole" remedy for its refusal to negotiate is inconsistent with this Court's decision in *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970). That contention was fully considered by the court below, which found it to be without merit (A27-A30). We believe the reasoning of the court below to be wholly persuasive. In any event, even if the question were more difficult than it appears to us, it is not one warranting review by this Court. To our knowledge, this is the first case in which an arbitrator has ever fashioned a "make whole" award containing the features challenged by the Company, and the unique circumstances which made that award appropriate (an employer's outright refusal to negotiate pursuant to the terms of a contractual reopener provision) are unlikely to recur very often, if ever, in the future.

3. The Company and Amicus both contend that the arbitrator's remedy for the checkoff violations exceeded his authority. The Company's arguments were rejected by the

court below for reasons which seem to us entirely valid (A34-A36). The somewhat different argument advanced on this point by Amicus was never presented to the court below and, in any event, appears frivolous on its face.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U.S. FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-248

UNITED STATES GYPSUM COMPANY,
Petitioner and Defendant-Appellee-Cross-Appellant Below,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Plaintiff-Appellant-Cross-Appellee Below.

PETITION FOR REHEARING.

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IN THE

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UNITED STATES GYPSUM COMPANY,
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vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Plaintiff-Appellant-Cross-Appellee Below.

PETITION FOR REHEARING.

Petitioner, United States Gypsum Company (Gypsum), respectfully moves this Court for an order (1) vacating its denial of the petition for certiorari entered November 11, 1974, and (2) granting the petition in the above entitled cause. As grounds for this motion, petitioner states:

The primary question presented for decision of this Court under Gypsum's petition is whether a successor employer who, prior to and upon the acquisition of the assets of a business enterprise, expressly rejected the collective bargaining agreement negotiated with his predecessor is, nevertheless, bound by the provisions of said agreement.

The brief of United Steelworkers of America, AFL-CIO (Steelworkers) in opposition to Gypsum's petition indicates and

argues, however, that the arbitrator's awards in this case were a "make whole" remedy for refusal of Gypsum to negotiate with the Steelworkers and were sustained by the Court of Appeals on this basis. If weight was given to this contention the facts and argument upon which it is based are misleading and call for the following supplement to the statement of the case. The alleged refusal by Gypsum to negotiate with the Steelworkers found by the arbitrator was on the premise that Gypsum was bound by law to the provisions of the collective bargaining agreement. Gypsum at no time took the position that it would not negotiate with the Steelworkers if they represented a majority of its employees and the determining issue in this proceeding is not refusal to negotiate but whether Gypsum was bound by the collective bargaining agreement of its predecessor.

SUPPLEMENT TO THE STATEMENT OF THE CASE.

In pre-employment interviews held March 23 through March 26, 1965, with groups of two to eight employees of the predecessor employer, United Cement Company, Inc. (United), in which the local union officials participated, a representative of Gypsum stated that Gypsum was negotiating to purchase certain assets of United's plant, that if the purchase were consummated the labor contract with United would not be effective with Gypsum, that the check-off thereunder would end, that Gypsum, however, would recognize and negotiate with the Steelworkers if they represented a majority of the employees, that there would be new seniority rules, a new insurance plan, a new vacation plan, and new safety rules and if these individuals desired employment by Gypsum on this basis to fill out application blanks. The Steelworkers did not at any time request Gypsum to negotiate but on May 3, 1965 the Steelworkers' business agent inquired about delay in remitting April union dues under the check-off provision of the contract and was advised *inter alia* that Gypsum needed some evidence of the Steelworkers' repre-

sentative status. The business agent replied that a statement would be forthcoming. Instead, on May 18, 1965, the Steelworkers filed the grievance here involved. Answering this grievance by letter Gypsum again stated that it "stands ready upon request to negotiate a contract with any union representing a majority of its employees" and that Gypsum assumed that the Steelworkers would submit the statement of its representative status as indicated on May 3, 1965.

The Steelworkers were interested only in compelling recognition of the contract negotiated with United and without further contact with Gypsum filed an action to compel Gypsum to recognize that contract and comply with the provisions thereof including the arbitration clause. Gypsum then instituted proceedings before the National Labor Relations Board (Board) to ascertain the representative status of the Steelworkers which resulted in their decertification. The Steelworkers at no time requested that Gypsum negotiate except upon the assumption that the reopener in the contract bound Gypsum to negotiate thereunder on a wage increase and paid holidays. This reopener could not be exercised, however, until approximately ten months after the grievance was presented.

On the theory that Gypsum's refusal to honor the contract in the face of *Wiley* constituted a flagrant unfair labor practice the arbitrator ordered that the wage increase award to employees be made through the Steelworkers for the purpose of giving the Steelworkers the opportunity to tell their story and again organize the plant.

ADDITIONAL REASONS FOR GRANTING THE WRIT.

The arbitrator concluded that *Wiley*[1] bound Gypsum to the entire contract negotiated with United and rendered awards against Gypsum on the two provisions of said agreement which he found had been violated by Gypsum. Subsequently, this

1. 376 U.S. 543 (1964).

Court rendered its decision in *H. K. Porter*[2] reaffirming the fundamental national labor policy established by Congress of "private bargaining under governmental supervision of procedure alone, without any compulsion over the actual terms of the contract" and holding that the Board could not compel an employer to adopt a check off provision. This fundamental national labor policy was emphasized again by this Court in its decision in *Burns*,[3] holding that an order of the Board that Burns, a new employer, make whole its employees for losses suffered by reason of refusal to honor the contract of its predecessor could not be sustained. In this case the Court of Appeals, however, holds that the arbitrator can, consistent with the national labor policy, hold Gypsum bound by provisions of the collective bargaining agreement negotiated with United. Unless the Writ is granted this decision of the Court of Appeals will stand as authority for the anomalous proposition that under decisions of this Court the Board cannot hold an employer bound by contract provisions but that in an involuntary arbitration ordered in a Section 301(a) action an arbitrator can, as a matter of law, hold the employer bound thereby.[4] In such an arbitration the court delegates to the arbitrator a judicial function and the arbitrator is acting essentially as a special master.[5] If, in such an arbitration, an arbitrator can hold a successor employer bound by provisions of the contract with his predecessor, which the successor has not consented to, it logically follows that this decision is also authority for the prin-

2. 397 U.S. 99, 108 (1969).

3. 406 U.S. 272, 287 (1972).

4. See Frederick K. Slicker, A Reconsideration of the Doctrine of Employer Successorship, 57 Minn. L. Rev. 1051 at pp. 1097-1102; Charles G. Bakley, Jr. and James S. Bryan, Survival of the Bargaining Agreement: The Effect of Burns, *27 Vanderbilt L. Rev., No. 1* (Jan. 1974), 117 at pp. 122-130.

5. A reference of a case for final decision on both law and fact requires the consent of the parties, *Kimberly* v. *Arms*, 129 U.S. 512, 524 (1888).

cipal that, contrary to the fundamental national labor policy of private bargaining established by Congress, a court can do so.[6]

The decision of this Court in *Wiley* recognized the need for federal law to strike a balance between the rightful prerogative of owners independently to rearrange their businesses and some protection to employees from a sudden change in the employment relationship.[7] Although urged in that case to do so,[8] this Court stopped short of holding that a new employer was bound by the collective bargaining agreement negotiated with his predecessor. In enacting the NLRA (49 Stat. 449) Congress made clear that the Act did not compel agreements or permit governmental supervision of their terms.[9] In the debates on the LMRA (68 Stat. 136) Congress made clear its intention to reject the determination of terms of employment through compulsory arbitration.[10] If this Court permits the decision of the Court of Appeals in this case to stand, that Court will accomplish through the intervention of an arbitrator a result which this Court refused in *Wiley* and which is in direct conflict with fundamental national labor policy and the policy and the principle established by Congress that industrial peace is best promoted by protecting employees' rights through private collective bargaining (29 U.S.C.A. § 203(d)).

The fact that decisions under *Wiley* directing arbitration between a successor employer and his predecessor under the col-

6. See Lee C. Shaw and Philip V. Carter, Sales, Mergers and Union Contract Relations, 19 N.Y. Univ. Ann. Conf. on Labor, 357 at pp. 370-371.

7. 376 U.S. 543 at p. 549.

8. Brief of AFL-CIO as Amicus Curiae pp. 8-22, in 376 U.S. 543.

9. See *Porter Co.* v. *NLRB*, 397 U.S. 99, pp. 103-105.

10. Sen. Rep. 105, 80th Cong. 1st Sess. Part W, p. 1 (Apr. 22, 1947) and p. 28 (Apr. 17, 1947); H. Rep. No. 510, 80th Cong. 1st Sess. pp. 35, 62-63 (June 21, 1947) and pp. 100-102 (Apr. 11, 1947).

lective bargaining agreement negotiated with the predecessor have not resulted in arbitration proceedings except in rare instances does not minimize the impact of the decision in this case on industry. In every acquisition or transfer of a business enterprise the existence of a collective bargaining agreement negotiated with the predecessor is an important consideration. The fact that in such cases the parties have opted to negotiate a new contract rather than arbitrate under the old agreement demonstrates that it was their belief that their interests were better served by negotiation of a contract mutually agreeable to the parties rather than through arbitration. In these cases imposition of the old contract or provisions thereof was considered less desirable and might well be a disruptive influence in the labor relations of the parties.

The Congressional purpose and policy set forth in Section 1 of the NLRA (49 Stat. 449) and reaffirmed in Section 1 of the LMRA (68 Stat. 136) is to protect the right of employees to organize and to secure equality between employer and employees in bargaining.[11] The Board was created to supervise and oversee compliance with this purpose and policy. A fundamental policy under the statutes is freedom to contract.[12] If the decision of the Court of Appeals in this case is permitted to stand an arbitrator, and possibly the court in a Section 301(a) action, will have authority to bind a successor employer by the contract of its predecessor or portions thereof in violation of this fundamental national labor policy, and the balance sought in *Wiley* will be destroyed. In *Burns* this Court protected the employees from the result of the change in ownership by requiring that the new employer bargain with the collective bargaining representative who had negotiated a contract with the prior employer. No better principal of law for the protection of employees from a sudden

11. See also Seymour Swerdlow, Freedom of Contract in Labor Law: Burns, H. K. Porter and Section 8(d), 51 Tex. Law Rev. No. 1 (Dec. 1972) 1 at p. 21.

12. *Porter Co.* v. *NLRB*, 397 U.S. 99, pp. 107-108.

change of their employer has been devised which will not conflict with the fundamental principle of freedom of contract prescribed by Congress.

For brevity in its petition Gypsum stated in one sentence that the check off award was punitive in nature. This seemed obvious from the provision in the check off award denying Gypsum the right of reimbursement from wages of employees for their checked off union dues. The portion of the wage increase award directing that payment be made through the Steelworkers to give the Steelworkers an opportunity to explain their position and reorganize the plant is likewise punitive in nature and violates Section 8(a)(3) of LMRA (29 U.S.C. § 158(a)(3)). It is the general rule that an arbitrator cannot award punitive damages.[13] This Court has ruled that the Board cannot do so.[14] The decision of the Court of Appeals in this case conflicts with the principle of uniformity of law in actions under Section 301(a). It stands as authority that an arbitrator may award punitive damages. It may also be construed as authority that in a Section 301(a) action punitive damages may be awarded.[15] This aspect of the decision is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Local 127, United Shoe Workers* v. *Brookes Shoe Mfg. Co.*, 297 F.2d 277, 278-284 (1962) holding that punitive damages cannot be recovered in an action under Section 301(a) of the Act.

THE IMPORTANCE OF THE PRIMARY QUESTION PRESENTED.

The decision in this case is of national importance. Its impact has a heavy significance in periods of recession, such as that now occurring, when financial conditions often generate the transfer,

13. Elkouri and Elkouri, How Arbitration Works, Rev. 2d pp. 257-258.

14. Republic Steel Corp. v. NLRB, 311 U.S. 7 at pp. 11-12.

15. See *supra*, pp. 4-5.

merger or reorganization of business enterprises. Any labor relations obligation created by federal law which is likely to deter employers from entering into such a transaction is of national importance and deleterious to employers, employees and industry alike. A new employer may not desire to be bound by the collective bargaining agreement negotiated with his predecessor. He may desire to select his own employees, assign their work and not be bound by the seniority provisions of the predecessor's contract. He may desire new vacation plans and fringe benefits. He generally will hesitate to be involved in his predecessor's labor problems. He may desire to fix his own initial wage rates and terms of employment, as he may lawfully do under *Burns*,[16] but if this decision of the Court of Appeals stands, he cannot do so without running the risk of an unfair labor practice if the union takes appropriate steps to compel arbitration and the arbitrator should hold that the new employer is bound by any of the provisions of the prior contract which conflict with his initial terms of employment[17] That this case does not affect only Gypsum, but is important to industry generally, is demonstrated by the fact that the Chamber of Commerce of the United States of America, Amicus Curiae, supports Gypsum's petition. While the brief of the Amicus Curiae supporting the petition urges *inter alia* overruling *Wiley*, the primary objection of the Amicus Curiae to the decision of the Court of Appeals in this case is its holding that an arbitrator, and possibly a court, may compel a successor employer to adopt provisions of the contract of his predecessor. The importance of the primary question presented in Gypsum's petition for the writ of certiorari is further emphasized by the numerous articles in legal publications, services and trade journals discussing the uncertainty of the obligations of a new employer under the collective bargaining agreement of his

16. 406 U.S. 272 at pp. 294-295.

17. See Charles G. Bakaly, Jr. and James S. Bryan, Survival of the Bargaining Agreement: The Effect of Burns, *27 Vanderbilt L. Rev No. 1* (Jan. 1974) 117 at pp. 128-129.

predecessor because of the conflict between the respective principles of federal law underlying *Wiley* and *Burns*.

CONCLUSION.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari and Brief of the Amicus Curiae, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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CERTIFICATE OF SERVICE.

I hereby certify that on this 29th day of November, 1974, copies of the foregoing Petition for Rehearing were mailed postage prepaid to Michael H. Gottesman and Jerome A. Cooper, attorneys for the respondent. I further certify that all parties required to be served have been served.

HAROLD D. BURGESS,
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